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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1932.

No. 587

CONSOLIDATED TEXTILE CORPORATION,
*Appellant,*

*vs.*

JOHN J. GREGORY, Judge of the Circuit Court of Milwaukee County.

On Appeal from the Supreme Court of the State of Wisconsin.

## BRIEF FOR APPELLANT, CONSOLIDATED TEXTILE CORPORATION.

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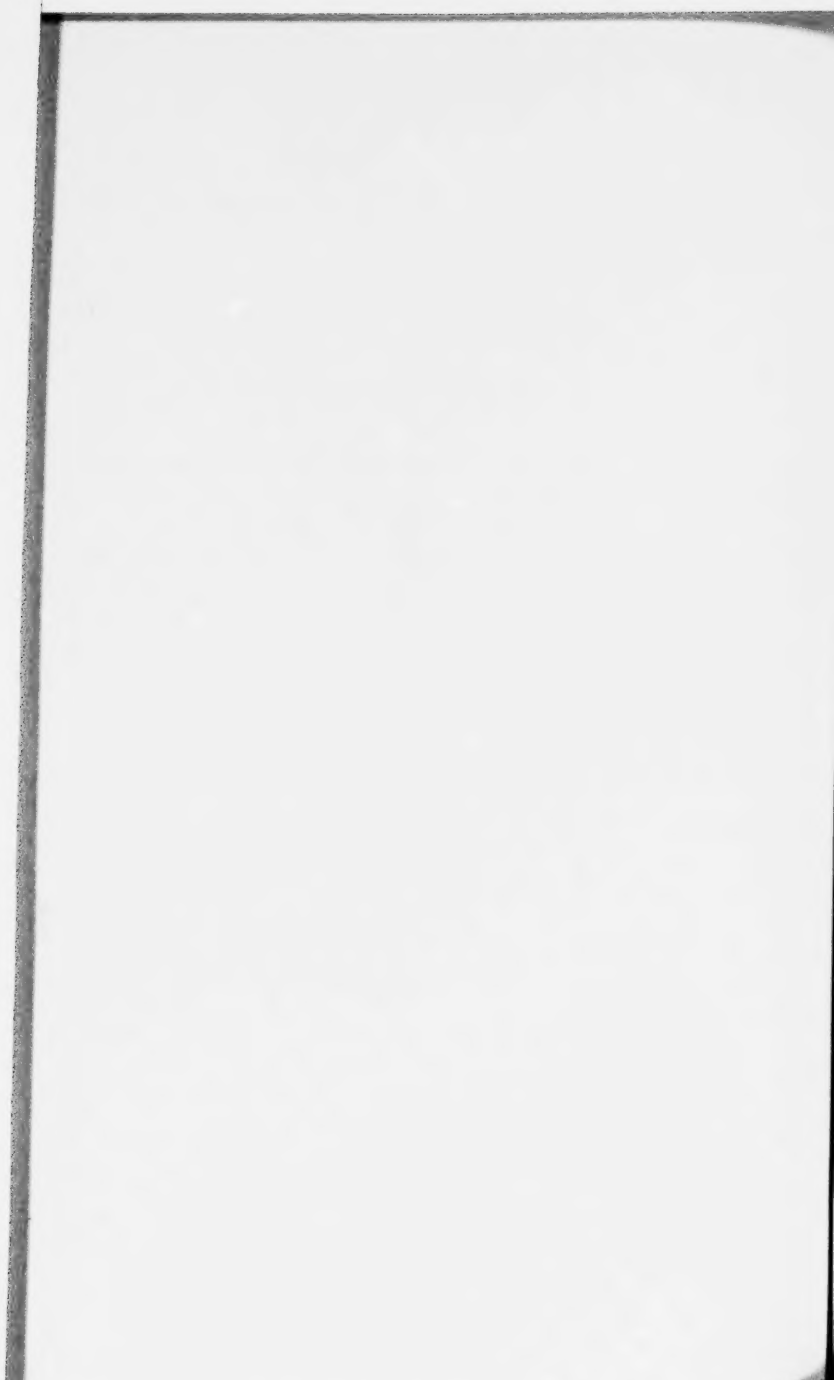

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# Supreme Court of the United States

No. 587, October Term, 1932.

Consolidated Textile Corporation,
Appellant,

*vs.*

John J. Gregory, Judge of the Circuit Court of Milwaukee County.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

## BRIEF FOR APPELLANT.

### Reference to Opinion of the Court Below.

The opinion of the Supreme Court of Wisconsin (R. 38) is reported in 245 N. W. 194 (advance sheets of December 14, 1932); it has not yet been reported in the official State reports.

### Statement as to Jurisdiction.

Rule 12 of this Court has been complied with, we believe, in the Statement as to Jurisdiction heretofore filed herein. The subject has been also discussed in Appellant's brief in opposition to a motion to dismiss or affirm, the determination of which was postponed to the hearing on

* Unless otherwise stated, italics in this brief are ours.

the merits. For convenience, however, a brief statement on the subject follows:

The appeal is from a final judgment of the Supreme Court of Wisconsin (R. 37) denying a writ of prohibition directed to the Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, Wisconsin, and Katherine Gold, restraining them from proceeding further with an action attempted to be brought in said Circuit Court in which Katherine Gold was named as plaintiff and Appellant as defendant, wherein a personal judgment was sought against Appellant. In its petition in the prohibition proceeding in the Supreme Court of Wisconsin (R. 4), Appellant alleged that the Circuit Court of Milwaukee County was without jurisdiction over Appellant because it is a foreign corporation, was not licensed to do, and had not transacted, business in Wisconsin and had no property or agent in that State; that service of process on Appellant's president while temporarily in the State was invalid and that the State statute providing for service of process on foreign corporations, if construed to authorize the service made on Appellant's president as aforesaid, was repugnant to the Due Process clause of the Fourteenth Amendment to the Constitution of the United States (R. 5-6).

The Supreme Court of Wisconsin, after a hearing following the return to an alternative writ of prohibition, held that the service was authorized by the State statute; overruled Appellant's contention that the statute was repugnant to the Due Process clause of the Fourteenth Amendment (Opinion, R. 38) and entered final judgment denying the writ of prohibition (R. 37).

(a) The matter is brought to this Court pursuant to the provisions of Section 237 of the Judicial Code as amended

(U. S. C., Title 28, Section 344), which permits an appeal from a final judgment in any suit in the highest court of the State in which a decision in the suit could be had where is drawn in question the validity of a statute of the State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

(b) The State statute, the validity of which is challenged, is subsection (13) of Section 262.09 of the Wisconsin Statutes and is found in the official printed edition of the Wisconsin Statutes for the year 1931, at pages 1970-71. The material portions of the section are as follows:

> "262.09. Service on corporations. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served, and such service held of the same effect as personal service on a natural person, by delivering a copy thereof as follows:
>
> * * * * * *
>
> (13) If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state, or any trustee or assignee of such corporation, or upon the secretary of state, as provided in section 226.02. But such service can be made upon a foreign corporation only either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state, and upon the secretary of state only when the cause of action arises out of business transacted in this state or when the defendant has property therein."

(c) The date of the final judgment of the Supreme Court of Wisconsin sought to be reviewed is November 9,

1932 (R. 37). The application for appeal was presented to, and allowed by, the Chief Justice of the Supreme Court of Wisconsin on December 6, 1932 (R. 1, 2).

The proceeding for a writ of prohibition was a proceeding under the original jurisdiction of the Supreme Court of Wisconsin (R. 37) and its judgment denying the writ is a final judgment of the highest court of that State in which a decision in the proceeding can be had. Section 3, Article VII, of the Constitution of Wisconsin provides:

> "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, *quo warranto*, certiorari, and other original and remedial writs, and to hear and determine the same" (Wisconsin Statutes, 1931, p. 31).

The constitutional grant of original jurisdiction and power to the Supreme Court is supplemented by Section 251.10 of the Wisconsin Statutes, which provides:

> "251.10. Original jurisdiction; writs in vacation. In addition to the writs mentioned in section 3 of article 7 of the constitution, the supreme court shall have power to issue writs of prohibition, *supersedeas*, *procedendo* and all other writs and process not specially provided by statute which may be necessary to enforce the due administration of right and justice throughout the state; and any justice of said court in vacation shall, on good cause shown, have power to allow writs of error, *supersedeas* and certiorari, and also to grant injunctional orders."

See *In the Matter of the Exercise of the Original Jurisdiction of the Supreme Court,* 201 Wisc. 123; 229 N. W. 643.

An appeal from a final judgment in a prohibition proceeding is an appeal from a final judgment within the meaning of Section 237 of the Judicial Code as amended.

*Bandini Co.* vs. *Superior Court,* 284 U. S. 8, 14;
*Michigan Central* vs. *Mix,* 278 U. S. 492, 494;
*St. Louis B. & M. Ry.* vs. *Taylor,* 266 U. S. 200, 206-207.

## Statement of the Case.

The cause was heard on demurrer (R. 36) to the return to the alternative writ of prohibition, the record before the Supreme Court consisting of Appellant's petition for writ of prohibition (R. 4), together with annexed exhibits (comprising the record on which the Circuit Court acted), the alternative writ (R. 26) and the return thereto (R. 32).

The material facts are as follows:

Appellant is a Delaware corporation, having its office and principal place of business in New York City, New York (R. 1, 2). It is not licensed to do business in the State of Wisconsin (R. 13). It has never done any business in that State (R. 12). It has no property or place of business or office or agent in the State (R. 13). Frederick K. Rupprecht, its President, is a resident of the City, County and State of New York (R. 13).

On January 14, 1932, service of process was attempted to be made upon Appellant in seven actions in the Circuit Court for Milwaukee County, Wisconsin, in one of which

Katherine Gold purported to be plaintiff and Appellant was named defendant, by delivering the copies of the summonses and complaints to Mr. Rupprecht while he was in the office of Mr. Walter L. Gold, a member of the firm acting as attorney for the plaintiffs, where he had gone to confer with Mr. Gold in an effort to convince him of the wisdom of withholding the entry of judgment in an action which had been brought against Appellant in the Municipal Court of the City of New York, N. Y. (R. 5, 13) and of seeking to arrange with the holders of the bonds represented by him to deposit them with a Bondholders Protective Committee which held approximately seventy per cent. of the issue then outstanding (R. 13, 14, 15, 19, 20).

The New York action was brought in January, 1931, by one Edythe H. Stegman to recover interest due December 1, 1930, on certain First Mortgage Bonds issued by Appellant (R. 13, 14). Mr. Gold owned some of said bonds and represented the owners of the others (R. 13, 14). Prior to January 14, 1932, a motion by plaintiff for a summary judgment in the New York action had been granted but judgment had not been entered (R. 14). It was the judgment of the bondholders' committee and of Mr. Rupprecht that the interest of the bondholders would not be served by action at that time to enforce the mortgage or otherwise (R. 14). In the interest of the Committee and Appellant corporation, as well as in his own interest (R. 14), Mr. Rupprecht had sought to arrange an interview with Mr. Gold in Milwaukee for the purpose of acquainting him with facts which Mr. Rupprecht believed would dissuade Mr. Gold from causing judgment to be entered in the New York action and hoped might influence him to have the said bonds deposited with the Committee. To that end, Mr.

Zinman, the New York attorney for the plaintiff in the suit pending there, was requested to communicate with Mr. Gold and arrange the desired conference (R. 14). Mr. Gold replied to a letter from Mr. Zinman to the effect that he saw no purpose to be gained from a conference in Milwaukee (R. 14). On Monday, January 11, 1932, Mr. Rupprecht informed Mr. Zinman that he would be in Chicago the latter part of the week and requested Mr. Zinman to telephone Mr. Gold asking permission for Mr. Rupprecht to call on him in Milwaukee for the purpose of advising him of the situation in an endeavor to persuade him not to have judgment entered in the New York action (R. 14). On the following day it occurred to Mr. Gold that if Mr. Rupprecht should call upon him, Mr. Gold would have him served with process in Wisconsin, whereupon, he instructed Mr. Morris Karon, one of his lawyer associates, to prepare the summonses and complaints in the seven actions (R. 22).

On January 14, 1932, Mr. Rupprecht called on Mr. Gold solely for the purpose of discussing with him the New York action and of presenting to him the facts which Mr. Rupprecht believed would persuade Mr. Gold to refrain from entering judgment in the action and to deposit his own bonds and recommend to those whom he represented the deposit of their bonds with the bondholders' committee (R. 15). Mr. Gold, however, declined to listen, stated he was not interested in the facts, and knew them to be otherwise, and before Mr. Rupprecht left attempted to serve him with the summonses and complaints, being himself the plaintiff in one of the actions (R. 15).

The complaint in the action by Katherine Gold claimed the right to recover interest due June 1, 1931 and December 1, 1931, and also the principal amounts of First Mortgage

Bonds issued by the Appellant, notwithstanding that by their terms the bonds are payable June 1, 1941, at the principal office of The Chase National Bank in the City of New York, State of New York; the allegation as to maturity being merely that the plaintiff is informed and believes that the holder of a bond may always declare due the principal thereof if the interest be in default and that she has made such declaration (R. 10-12).

Appellant appeared specially (R. 5, 24) in said action and moved to vacate the service on the ground that the Court was without jurisdiction because defendant is a Delaware corporation, was not licensed to do business in Wisconsin, had not in fact done business in that State, had no property or place of business or office or agent in the State; that Mr. Rupprecht, president of Appellant, was a resident of New York; that the attempted service had been made while he was temporarily in Milwaukee and that to give effect thereto would constitute a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 5).

Appellant's motion was denied by an order entered on June 30, 1932 (R. 24, 25); and on the following day, without notice to Appellant that the motion had been decided, a default judgment was entered for plaintiff and against defendant (Appellant here) for the full amount prayed in the complaint (R. 25). Appellant's attorneys were unaware that the motion had been decided until July 12, 1932, when notice of the entry of the order of June 30 and of the judgment on July 1 was received from the attorneys for the plaintiff (R. 25). Thereafter the Court, after a hearing on an order to show cause, on its own motion set aside the judgment and granted a five-day stay within which to

enter a general appearance, demur, answer or otherwise plead to the plaintiff's complaint or to take further proceedings in said action (R. 25-26).

Thereupon, Appellant filed its petition for writ of prohibition in the Supreme Court of Wisconsin (R. 4), in accordance with the procedure in respect of the original jurisdiction of that Court, in which petition, or in the exhibits annexed thereto, the facts above stated were set forth. The petition also alleged that service of summons on a foreign corporation was controlled by the Statutes of the State of Wisconsin, that subsection (13) of Section 262.09 of the Wisconsin Statutes was the only statute in any manner dealing with service of summons in such an action, that the service attempted was not authorized thereby, and that if it were, the statute was unconstitutional in that it deprived Appellant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States (R. 6). The same facts and claims of the Appellant were set forth in the alternative writ which was thereupon issued by the Supreme Court (R. 26).

A motion to quash the alternative writ was filed in due course by respondents (R. 32). Before hearing that motion, respondent Honorable John J. Gregory, Judge of the Circuit Court of Milwaukee County, Wisconsin, filed a return to the alternative writ, which was adopted by respondent Katherine Gold (R. 32, 36). In order to expedite the proceeding, the parties stipulated that the motion to quash be withdrawn, that the return be amended as specified and that the matter be heard on Appellant's demurrer to the amended return (R. 36-37).

The Court sustained the jurisdiction of the Circuit Court, overruled Appellant's contention that such result

was repugnant to the due process clause of the Fourteenth Amendment and entered final judgment denying the writ of prohibition (R. 37, 38-44).

Because of certain contentions in the Court below, the following facts which would otherwise be immaterial, are also noted:

Annexed as an exhibit to the Appellant's petition for writ of prohibition is copy of the affidavit of Frederick K. Rupprecht (R. 12) in support of the motion to set aside the service (R. 12). Appellant also annexed to its petition, at the request of the attorneys representing Katherine Gold and "to obviate the necessity of filing a return to the alternative writ" (R. 6), copy of the affidavit of Walter L. Gold and copy of affidavit of Morris Karon used on the motion (R. 17, 23). In Mr. Gold's affidavit, the statement is made that at the conference with Mr. Rupprecht, the latter "stated to affiant that he was in Milwaukee to see Mr. Loeffer of Goll & Frank and Gimbel Bros., who were customers of Consolidated Textile Corporation" (R. 19), and that at such conference "Mr. Rupprecht tried to interest affiant in the sale of Consolidated Textile Corporation's mills at Henderson, Kentucky" (R. 19), that "a large part of the conversation was devoted by Mr. Rupprecht in discussing the properties of the company at Henderson" and various details concerning the company's properties in Henderson and "the reason for the desire of the company to sell this property" and that Mr. Rupprecht said "that his company would be glad to pay affiant well for his services in trying to effect such sale and would pay him a commission if a sale were made" (R. 19).

Mr. Gold also said "Affiant has been informed that through Consolidated Selling Co., Inc., which is the selling

agency for Consolidated Textile Corporation and is a subsidiary wholly controlled by Consolidated Textile Corporation and is an agent of Consolidated Textile Corporation, the Consolidated Textile Corporation sells goods in Wisconsin, to wit, to Gimbel Bros. in Milwaukee and Sears, Roebuck & Co. in Milwaukee" (R. 22).

In the return to the alternative writ of prohibition Judge Gregory of the Circuit Court stated (Paragraph 11, R. 35):

> "Respondent further shows to the court that *upon full and fair consideration of the affidavits of both the plaintiff and the defendant* upon the said motion, I found that said Frederick K. Rupprecht, president of said defendant corporation, *was sent by said defendant corporation to Wisconsin to attempt to settle the seven individual claims of Wisconsin bondholders* against said defendant corporation and at the time of the service of process in the above case upon him he was in Wisconsin on the business of said defendant corporation, and that he was then engaged in conducting business of said corporation in Wisconsin; *that Mr. Rupprecht told Mr. Gold* that he was then also in Wisconsin on the business of said corporation with several of its customers in Wisconsin; *and that in addition said defendant corporation had been doing business in Wisconsin through a wholly owned and controlled subsidiary, Consolidated Selling Company, Inc.*" (This paragraph of the return was amended by stipulation (R. 36) by inserting the words "that Mr. Rupprecht told Mr. Gold.")

Notwithstanding that the statements above quoted from the affidavit of Mr. Gold supply the only possible basis (other than Mr. Rupprecht's conference with Mr. Gold re-

garding the New York action) for the foregoing statements of Judge Gregory, we are somewhat nonplussed to find that, in their brief in behalf of Appellant in opposition to Appellee's motion to dismiss or affirm, Appellant's counsel fell into one of the same errors as did Judge Gregory, as the result of which, on page 2 of such brief, the statement is made "that the president of the Appellant came to the State of Wisconsin for the purpose of settling the claims of the holders of bonds issued by Appellant"; and by asserting in their "Statement as to Jurisdiction" (p. 10) that Mr. Rupprecht was in Wisconsin "for the purpose of compromising an action instituted by a resident of Wisconsin against the foreign corporation in a sister State"; (p. 11) that the president was temporarily in the State "for the purpose of compromising a suit brought against said corporation in a sister State," and (p. 13) that Appellant's officer had "made an isolated visit to the State for the purpose of compromising an action instituted against the corporation in a sister State." Notwithstanding the foregoing, in the same Statement (p. 6) it is correctly said that "On January 14, 1932, Mr. Rupprecht came to Milwaukee for the *sole purpose* of discussing with Mr. Gold the New York action and to present to Mr. Gold facts which, in Mr. Rupprecht's opinion, would dissuade Mr. Gold from further proceeding with the action in New York." Although the variation in the statements may be inconsequential, we point it out in a spirit of frankness.

If we understand correctly Appellee's attitude, it is that her position is improved because, as she claims, (a) Mr. Rupprecht was in Wisconsin for the purpose of settling the claims upon which the Wisconsin actions were based and stated that he intended calling upon customers of

Appellant resident there; (b) Appellant's subsidiary, Consolidated Selling Co., Inc., sold merchandise to residents of, or those transacting business within, that State.

As to (a), it suffices to say that in Mr. Rupprecht's affidavit, in the petition for the writ of prohibition and in the alternative writ it is definitely stated that Appellant had transacted no business whatsoever in the State of Wisconsin, that Mr. Rupprecht's sole purpose in coming to Milwaukee was to confer with Mr. Gold with reference to the New York action and, incidentally, to seek to prevail upon him to deposit and influence others to deposit bonds with the Committee; also that Mr. Rupprecht did not on his visit to Milwaukee in January, 1932, or at any other time, confer with Gimbel Bros. in the City of Milwaukee or with any other mercantile establishment there (R. 6, 7, 13-15, 28-29). Accordingly, even though Mr. Gold's statement were true, that Mr. Rupprecht told him that he came to talk with customers, if he did not do so, no jurisdictional importance can be attached to the abortive intent. This appears to have been the view of the Supreme Court of Wisconsin because it based its conclusion solely upon the fact that Mr. Rupprecht's conference with Mr. Gold constituted the transaction of business within the State sufficient to give the Circuit Court jurisdiction over Appellant (R. 40, 41).

As to (b), it is alleged in the petition for the writ of prohibition that:

> "The Consolidated Selling Company is a corporation organized under the laws of the State of Delaware with its office and principal place of business in the City, County and State of New York; that your petitioner owns all of the stock of the said Consolidated Selling Company; that said Consolidated Selling Company is not licensed to do business

> in the State of Wisconsin and that the only business conducted by the Consolidated Selling Company in Wisconsin is interstate in character and is conducted by means of non-resident agents who solicit orders in Wisconsin which are accepted in New York City" (R. 7, 28-29).

As against this direct and positive statement, Mr. Gold merely says "that he has been informed" that Appellant conducts business in Wisconsin through Consolidated Selling Co., Inc. The source of Mr. Gold's information is not disclosed and no fact whatsoever is mentioned lending any color to the statement of the Circuit Judge that Appellant was transacting business in the State through its subsidiary; and, although Judge Gregory's statement is referred to in the narrative of facts preceding the opinion of the Supreme Court (R. 39), the succeeding portion of the opinion indicates clearly that, as mentioned above, its conclusion that Appellant was doing business in Wisconsin is based solely upon Mr. Rupprecht's visit.

In its brief on motion to dismiss or affirm, Appellee asserts that the foregoing facts are admitted by Appellant's demurrer to the return. But paragraph 11 of the return states a conclusion based upon the affidavits of plaintiff and defendant, true copies of which, as stated in the return (R. 33) are attached to the petition (R. 12-23). The demurrer admits that the Circuit Judge made the statement but does not admit that it correctly reflects statements in the two affidavits which are a part of the record and may be consulted by this Court.

> "* * * it is clear that in a case like the present, where the issue is whether a state statute in its application to facts which are set out in detail in the

> pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the State Supreme Court in this regard. The only respect in such a case in which this court is bound by the judgment of the State Supreme Court is in the construction which that court puts upon the statute." *Truax* v. *Corrigan,* 257 U. S. 312, 324-325.

See also *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 473.

## Specifications of Error.

The Supreme Court of Wisconsin erred:

1. In holding that the Circuit Court of the State of Wisconsin could obtain jurisdiction over an unlicensed foreign corporation which does no business in the State by service of process on its president who was temporarily within the State in its behalf solely to procure the withholding of judgment in an action pending against it in another State.

2. In holding that Section 262.09 (13) of the Wisconsin Statutes as construed by it does not deprive Appellant of its property without due process of law.

## Summary of the Argument

### I

**A state court cannot acquire personal jurisdiction over a foreign corporation, without its consent, unless the corporation is carrying on business in the state of such character and to such extent as warrant the inference that it has subjected itself to the jurisdiction of the state and is present therein**

*Determination of personal rights of a corporation by a court having no jurisdiction over it, is a denial of due process of law*

*Pennoyer* v. *Neff*, 95 U. S. 714;
*Riverside Mills* v. *Menefee*, 237 U. S. 189.

*The test of a state court's jurisdiction over a foreign corporation without its consent is whether or not it is transacting business within the state*

*The Lafayette Ins. Co.* v. *French*, 18 How. 340;
*St. Clair* v. *Cox*, 106 U. S. 350;
*Goldey* v. *Morning News*, 156 U. S. 518;
*Conley* v. *Mathieson Alkali Works*, 190 U. S. 406;
*Mechanical Appliance Company* v. *Castleman*, 215 U. S. 437;
*St. Louis S. W. Ry. Co.* v. *Alexander*, 227 U. S. 218;
*International Harvester Co.* v. *Kentucky*, 234 U. S. 579;
*Riverside Mills* v. *Menefee*, 237 U. S. 189.

*The business transacted must be of such character and extent as warrant the inference that the corporation has subjected itself to the jurisdiction of, and is present in, the state*

*St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218;
*Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U. S. 333;
*Rosenberg Co.* v. *Curtis-Brown Co.,* 260 U. S. 516;
*James-Dickinson Co.* v. *Harry,* 273 U. S. 119;
*Phila. & Reading Ry. Co.* v. *McKibbin,* 243 U. S. 264;
*People's Tobacco Co.* v. *Am. Tobacco Co.,* 246 U. S. 79;
*Green* v. *Chicago, Burlington & Quincy Ry.,* 205 U. S. 530;
*Bank of America* v. *Whitney Bank,* 261 U. S. 171;
*Louisville & N. R. Co.* v. *Chatters,* 279 U. S. 320.

*The business conducted within the state must be a substantial part of the main business of the foreign corporation and there must have been continuity in connection therewith*

*International Harvester Co.* v. *Kentucky,* 234 U. S. 579, 585;
*Eastman Kodak Co.* v. *Southern P. M. Co.,* 273 U. S. 359, 370, 374;
*Tauza* v. *Susquehanna Coal Co.,* 220 N. Y. 259, 266, 267;
*Holzer* v. *Dodge Brothers,* 233 N. Y. 216, 221.

## II

**Appellant was not doing business in the State of Wisconsin in such manner and to such extent as warrant the inference that it was present there**

*A single conference by its president temporarily in the state regarding an action pending in another state constituted the manner and extent of the business transacted by Appellant in Wisconsin*

*Recent controlling decisions of this Court establish that this was not sufficient transaction of business to subject Appellant to the jurisdiction of the state*

*James-Dickinson Co.* v. *Harry*, 273 U. S. 119;
*Rosenberg Co.* v. *Curtis-Brown Co.*, 260 U. S. 516.

*This case is not distinguishable on the ground that Appellant's president was in the state to settle controversies and that the action arose out of the same subject matter*

*The president was not sent to settle and did not attempt to settle claims against the corporation*

*The action brought against Appellant in Wisconsin had no relation to the claim which was the subject matter of the president's conference*

*Even if Appellant's president had been engaged in attempts to compromise and settle claims against it, that would not have constituted the transaction of business within the state of such character and extent as to subject Appellant to the jurisdiction of the state court*

*Good Hope Co.* v. *Railway Barb Fencing Co.*, 22 Fed. 635;
*St. Louis Wire-Mill Co.* v. *Consolidated Barb Wire Co.*, 32 Fed. 802;
*Louden Machinery Co.* v. *American Malleable Iron Co.*, 127 Fed. 1008;
*Wilkins* v. *Queens City Savings Bank & Trust Co.*, 154 Fed. 173;
*Buffalo Sandstone Brick Co.* v. *American Sandstone Brick Machinery Co.*, 141 Fed. 211;
*Ladd Metals Co.* v. *American Mining Co.*, 152 Fed. 1008;
*Craig* v. *Welsh Motor Car Co.*, 165 Fed. 554;

*Hoyt* v. *Ogden Portland Cement Co.*, 185 Fed. 889;

*Noel Construction Co.* v. *George W. Smith & Co.*, 193 Fed. 492;

*Henry M. Day & Co., Inc.* v. *Schiff Lang & Co.*, 278 Fed. 533;

*Painter* v. *Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139.

*Appellant not having voluntarily subjected itself to jurisdiction of the Wisconsin court, such jurisdiction could be exercised only in respect of actions arising out of business transacted in the state*

*Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 325;

*Mitchell Furn. Co.* v. *Selden Breck Co.*, 257 U. S. 213;

*Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93;

*Simon* v. *Southern Ry. Co.*, 236 U. S. 115;

*Old Wayne Mutl. Life Assn.* v. *McDonough*, 204 U. S. 8;

*Smolick* v. *Phila. & Reading Coal Co.*, 222 Fed. 148;

*Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432.

*To sustain jurisdiction over Appellant it was essential not only that its president be acting as its agent in the state but also that Appellant be actually engaged in the transaction there of business of such nature and extent as to subject it to state jurisdiction*

*Appellant would not be amenable to suit in Wisconsin even if its subsidiary, as claimed, were doing business in the state*

*Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333;

*Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 326;

*People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U. S. 79, 87;

*Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 268;

*Peterson* v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 391-392;

*Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 409;

*Pullman Car Co.* v. *Missouri Pac. Co.*, 115 U. S. 587, 597.

# ARGUMENT.

## I.

**A State court cannot acquire personal jurisdiction over a foreign corporation, without its consent, unless the corporation is carrying on business in the State of such character and to such extent as warrant the inference that it has subjected itself to the jurisdiction of the State and is present therein.**

The early conception that a corporation could have no existence outside the State of its creation (*Bank of Augusta* v. *Earle,* 13 Pet. 519, 588), has given way to the necessities of commercial affairs and it is recognized that a corporation can do business, and become subject to suit, within another State. The fundamental principle that "proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law" (*Pennoyer* v. *Neff,* 95 U. S. 714, 733), is, however, controlling in respect of corporate defendants as well as individuals (*Riverside Mills* v. *Menefee,* 237 U. S. 189, 196); and the test to determine if a particular court can acquire personal jurisdiction over a foreign corporation is whether or not the corporation is doing business in the State within which the court is authorized to act. Lacking that essential, jurisdiction is wanting.

In the *Riverside Mills* case a State court of North Carolina had assumed jurisdiction of an action against a Virginia corporation because service of process had been made within the State upon a resident director in accordance with

a statute of the State, notwithstanding that the corporation was not doing business within the State. This Court reversed a judgment against the defendant and held that the State court had not acquired jurisdiction over the defendant. After referring to *St. Clair* v. *Cox*, 106 U. S. 350, and the numerous cases which had followed and applied it, the Court said (237 U. S. at p. 194):

> "* * * it is indubitably established that the courts of one State may not without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State where such corporation has not come into such State for the purpose of doing business therein, or has done no business therein, or has no property therein, or has no qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the State or even permanently reside therein, if not there for the purpose of transacting business for the corporation or vested with authority by the corporation to transact business in such State, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against the corporation upon a service had upon such an officer under such circumstances."

The rule had been announced in a long line of decisions relating to the power of State courts to render personal judgments against foreign corporations. In all of them, by implication or expressly, it was held that the authority of a State court is limited by the territorial confines of the State and that it may exercise jurisdiction over a foreign corporation only when such corporation by the transaction

of its business within the State can be deemed to have subjected itself to its jurisdiction and be present therein.

*The Lafayette Ins. Co.* v. *French*, 18 How. 340;
*St. Clair* v. *Cox*, 106 U. S. 350;
*Goldey* v. *Morning News*, 156 U. S. 518;
*Conley* v. *Mathieson Alkali Works*, 190 U. S. 406;
*Mechanical Appliance Company* v. *Castleman*, 215 U. S. 437;
*St. Louis S. W. Ry. Co.* v. *Alexander*, 227 U. S. 218;
*International Harvester Co.* v. *Kentucky*, 234 U. S. 579.

In the case last cited, which involved the right of a Kentucky court to pronounce a personal judgment against a foreign corporation, this Court said (234 U. S. at p. 583):

> "* * * when a corporation of one State goes into another in order to be regarded as within the latter it must be there by its agents authorized to transact its business in that State. The mere presence of an agent upon personal affairs does not carry the corporation into the Foreign state. It has been frequently held by this court, and it can no longer be doubted that it is essential to the rendition of a personal judgment that the corporation be 'doing business' within the State. *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, 226, and cases there cited. As was said in that case, each case must depend upon its own facts, and their consideration must show that this essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the State."

Although the extent and character of the business that will justify the exercise of such jurisdiction may not be susceptible of exact statement, repeated decisions of this Court have determined that the corporation must be doing within the State business of such character and extent as to support the inference that it has subjected itself to the jurisdiction and is present in the State.

> "A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction, it must appear that the corporation has transacted business in that district to such an extent as to subject it to the jurisdiction and laws thereof.
>
> * * * * * *
>
> "This court has decided each case of this character upon the facts brought before it and has laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to subject it to a given jurisdiction. In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process." *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, 226, 227.
>
> "The main question for decision is whether, at the time of the service of process, defendant was doing business within the State in such a manner and to such an extent as to warrant the inference that it was present there." *Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U. S. 333, 334-335.

To the same effect is

*Rosenberg Co.* v. *Curtis-Brown Co.*, 260 U. S. 516, 517.

> "Jurisdiction over a corporation of one State cannot be acquired in another State or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, *even if he is there on business of the company.*" *James-Dickinson Co.* v. *Harry*, 273 U. S. 119, 122.

In the four last cited cases, the actions were commenced in state courts and were removed to the federal court after service of process under state statutes. The question for decision, therefore, was the character and extent of business required to be done by a foreign corporation to subject it to the jurisdiction of the state court.

The same question is involved in determining the jurisdiction of a federal court over a corporation foreign to the State within which it is authorized to act, and precisely the same test has been applied.

> "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." *Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 265.

> "* * * The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The

general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 86-87.

To the same effect are

*Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 532;

*Bank of America* v. *Whitney Bank*, 261 U. S. 171, 172;

*Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 324-5.

The business conducted within the state must be a substantial part of the main business of the foreign corporation and there must have been continuity in connection therewith.

*International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 585;

*Eastman Kodak Co.* v. *Southern P. M. Co.*, 273 U. S. 359, 370, 374;

*Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259 267;

*Holzer* v. *Dodge Brothers*, 233 N. Y. 216, 221.

## II.

**Appellant was not carrying on business in the State of Wisconsin in such manner and to such extent as warrant the inference that it was present there.**

The Court below based its contrary conclusion solely upon Mr. Rupprecht's visit to confer with Mr. Gold (R. 38, *et seq.*). In other words, a single conference between the president of the Appellant corporation and Mr. Gold constituted the manner and extent of the business transacted by Appellant in Wisconsin.

Recent decisions of this Court are controlling and clearly establish the error of the ruling.

In *James-Dickinson Co.* v. *Harry,* 273 U. S. 119, service of process in an action in an Illinois state court was made on the president of a foreign corporation while he was temporarily in the State. The corporation "had not engaged in, or carried on, business within the State." But it was an admitted fact that the *president "was in Illinois on business of the corporation at the time of the service"* (p. 122). It was held that no jurisdiction was obtained over the corporation.

In *Rosenberg Co.* v. *Curtis Brown Co.,* 260 U. S. 516, an action was attempted to be brought against a foreign corporation in a New York state court by serving its president while temporarily in the State. It was claimed that the corporation was actually transacting business in the State, which consisted for the most part of purchases or orders for the purchase of merchandise for its retail store in Oklahoma; that the president was transacting business for the corporation on the occasion of his visit to New York

at the time of service, and numerous instances of the transaction of such business by him at that time were included in the record. This Court held, however, that the facts failed to bring the defendant within the established rule. Speaking for the Court, Mr. Justice Brandeis said:

> "Whether, at the time its president was served with process, he was in New York on business or for pleasure; whether he was then authorized to transact any business there; and to what extent he did transact business while there, are questions on which much evidence was introduced; and some of it is conflicting. But the issues so raised are not of legal significance. The only business alleged to have been transacted by the company in New York, either then or theretofore, related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the jurisdiction of the State. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 579; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79. And as it was not found there, the fact that the alleged cause of action arose in New York is immaterial. Compare *Chipman, Limited* v. *Thomas B. Jeffery Co.*, 251 U. S. 373, 379" (p. 518).

The court below being (in the language of Appellee's brief on motion to dismiss, p. 7) "committed to the doctrine that a single transaction in the State by a foreign corporation constitutes 'conducting any business' within the State under *section* 262.09 (13), so as to subject the foreign corporation to service of process in the State" (Opinion, R. 39-40), gave reluctant assent to the authority of the cases

above cited* and conceded that they "do support its (Appellant's) contention that the corporation was not so within the state as to be subject to the service of process *unless they are distinguishable from the case at bar*" (Opinion, R. 41).

Referring then to *James-Dickinson Co.* v. *Harrey*, 273 U. S. 119, apparently, the court sought to distinguish it in these words:

> "* * * It seems that the holding would not be proper where the corporation sends into a neighboring state its president for the purpose of winding up, compromising or settling a matter in difference between it and a resident of that state, having conferred on him full power and authority in that particular" (R. 42).

The assumed facts upon which the court below relied in attempting to find a distinction are indicated by the following quotations from its opinion:

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* It is noteworthy that the New York courts since the decision in *Riverside Mills* v. *Menefee*, 237 U. S. 189, have fully accepted the federal rule, (*Bagdon* v. *Phila. & Reading Coal & I. Co.*, 217 N. Y. 432; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259; *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270; *Holzer* v. *Dodge Brothers*, 233 N. Y. 216), although formerly holding, under the governing statute similar to the Wisconsin statute, that service on an officer of a foreign corporation temporarily and incidentally in the state was valid service on the corporation although neither he nor the corporation was engaged in business in the state. *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 276-277.

In the *Holzer* case, the New York Court of Appeals said:

> "The extent to which a corporation must do business in the state to justify the service of process upon its representative is not clearly defined, but under all of the authorities to which my attention has been called, *it must be some substantial part of its main business.* Nothing short of this will justify such service" (233 N. Y. at p. 221).

"Service * * * was made upon * * * the president * * * while he was in the city of Milwaukee for purpose of a conference with the attorneys of Mrs. Gold and of six other bondholders, to attempt to settle the controversy between such bondholders and the Consolidated Textile Corporation" (R. 38).

* * * * * *

"The trial court determined upon the affidavits submitted that the said Rupprecht president of the petitioner, was sent by it to Wisconsin to settle the seven individual claims of the Wisconsin bondholders against said corporation, one of which is the basis of the suit; * * *" (R. 38).

* * * * * *

"* * * here the petitioner deliberately entered the state for the purpose of negotiating with reference to the very matter out of which the suit arises" (R. 41).

Although, as we shall show, the facts thus assumed do not, under the decisions of this Court, justify the conclusion reached, the assumptions themselves are wholly unjustified. The statement of Judge Gregory, which, apparently, is the basis of the court's erroneous narrative, is:

"Respondent further respectfully shows to the court that *from the affidavit* of said Frederick K. Rupprecht, president of said defendant Consolidated Textile Corporation, *it clearly appeared* to the respondent that said Rupprecht as president of the said corporation insisted, against the objection of plaintiff's attorney, Walter L. Gold, upon coming to Wisconsin *for the purpose of attempting to settle a controversy between said Katherine Gold,* a holder of bonds of Consolidated Textile Corporation, and Consolidated Textile Corporation, and controver-

sies between said Consolidated Textile Corporation *and six other bondholders,* who likewise held said corporation's bonds to-wit, *Central Holding Company, Gold Realty Company, Walter L. Gold, Lillie Mock, Cecelia Alshuler and Blanche Oster,* who are all residents of Wisconsin. That the claims of said seven bondholders against Consolidated Textile Corporation were based on bonds issued by said Consolidated Textile Corporation *and sold to said bondholders* for value, and said Consolidated Textile Corporation had defaulted in the payment of interest *and principal* of said bonds *and the total claims of the said seven bondholders exceeded the sum of $15,000"* (R. 34).

Mr. Rupprecht's affidavit will be searched in vain (R. 12-16) for any averment supporting the statement of the learned Judge. Mr. Rupprecht's sole purpose, stated repeatedly, was to confer with Mr. Gold with reference to the New York action brought to recover only the coupons due December 1, 1930 on $9,200 principal amount of bonds (R. pp. 13 and 14, pars. 4 and 6) and to seek to persuade him not to have judgment entered in that action. He was in Wisconsin in behalf of the corporation, (a) only with regard to the New York action and (b) not for the purpose of settling or compromising it, but to cause the plaintiff to appreciate the injury which might result to the corporation and to all bondholders, if judgment were entered therein, and to refrain from entering it. There is not a scintilla of evidence that Mr. Rupprecht was authorized to compromise and settle the claims asserted in the Wisconsin suits, or that he was aware of any intention to assert them until after attempted service of process in that State.

Mr. Gold's affidavit fully corroborates Mr. Rupprecht regarding the purpose of the visit. Thus, he says that Mr. Zinman, the attorney acting for him in the New York action, wrote him with regard to Mr. Rupprecht's proposed conference with Mr. Gold:

> "They (Appellant's attorneys) are desirous of having one of the Company's representatives go out to Milwaukee for the purpose of conferring with you and possibly *persuading you that it is to the best interests of all bondholders that no judgment be entered in this action and that no further proceeding be taken*" (R. 17).

Again, relating Mr. Rupprecht's conversation, Mr. Gold said:

> "After such discussion, Mr. Rupprecht *asked affiant not to have judgment entered by Mr. Zinman in the New York action* of Stegman *vs.* Consolidated Textile Corporation. Mr. Rupprecht stated that he thought it would be to the interest of Edythe H. Stegman and the bondholders represented by affiant, *to have the entry of such judgment postponed.* Mr. Rupprecht asked affiant to telephone to Mr. Zinman at New York *to delay the entry of judgment and affiant finally consented to do so and did telephone to Mr. Zinman and stated to Mr. Zinman that Mr. Rupprecht was in affiant's office and had asked to have entry of judgment delayed for a little while,* and affiant stated to Mr. Zinman that he thought it would be advisable for all concerned *to delay the entry of judgment in New York*" (R. 19).

Mr. Gold's affidavit contains no assertion that Mr. Rupprecht came to discuss, or that he did discuss, a compromise or settlement of the claims made in the Wisconsin

suits until *after Mr. Rupprecht had been served with summonses and complaints in the seven actions,* when, he says, Mr. Rupprecht attempted to persuade Mr. Gold to withdraw the service and made offers looking to the adjustment of the actions (R. 20).

Mr. Rupprecht's solicitation of the deposit of the bonds with the Committee was primarily in its behalf. But even if he were acting as agent for Appellant, the transaction is akin to the solicitation of business, which would not have subjected Appellant to the jurisdiction of the Wisconsin court—especially as it was an isolated transaction unrelated to the ordinary business of Appellant.

*Green* v. *Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 533;
*International Harvester Co.* v. *Kentucky*, 234 U. S. 579, 586-587.

The Wisconsin actions did not arise out of and were only remotely related to the business which took Mr. Rupprecht to Wisconsin. The subject matter of the New York action was interest due December 1, 1930, on certain First Mortgage Bonds of Appellant. Neither Mr. Gold nor Mr. Rupprecht says that any part of their conference was concerned with its adjustment, except to such extent as may be involved in the request that the entry of judgment be deferred. The claims in the action brought by Mrs. Gold were for principal of certain bonds and the interest thereon payable June 1 and December 1, 1931; and the only reference in the record to its adjustment is that some effort in that direction was made after process therein had been served. As the Circuit Judge remarked "said action of Edythe H. Stegman had nothing to do with this (the Gold)

action, or the actions of the other six bondholders aforementioned" (R. 35).

The premises of fact being unfounded, the conclusion of law based thereon, of course, has no application.

But even if it be conceded that the facts were as assumed by the court below, it is submitted that it erred in ruling that an attempt by an officer of a foreign corporation to settle a controversy between it and a resident of the state constitutes the transaction of its business within the state in such manner and to such extent as to warrant the inference that it is present there. It is to be noted that the ruling is not predicated upon the fact that the cause of action arose out of any business of the Corporation transacted in the state. The assumption was that a controversy existed between the resident plaintiff and the foreign corporation which Mr. Rupprecht came into the State to adjust and compromise. It would seem that, if there be any single transaction by a corporation within a state which ought not to subject it to a penalty of foreign service, it should be an attempt to compromise and settle a controversy. Compromises and settlements of controversies are favored by the law and a state policy which would burden them in any manner is anomalous.

After assuming, without a particle of supporting evidence, that Rupprecht had gone to Wisconsin for the purpose of seeking to adjust the claims upon which the suits there were predicated, the court below considered that its ruling was supported by the decision of this Court in *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245. There, an adjuster of the defendant insurance company, a Pennsylvania corporation, went into the State of Missouri to settle an insurance loss resulting from the death of a Mis-

souri resident policy holder. Two questions were presented: (a) whether the agent who entered the state for the purpose of adjusting the loss was a proper party upon whom to make service and (b) whether the corporation was doing business within the state. As to the first, the Court held valid a Missouri statute expressly providing for service upon a foreign insurance company by delivering process within the state to one authorized to adjust or settle a loss; and that defendant's adjuster must be assumed to have been sent into the state with knowledge thereof. This ruling, however, merely involved the question as to the kind of agent upon whom service could be made if the corporation was within the jurisdiction, that is, if it was doing business within the state; and this Court found such to be the case, saying:

> "Was the defendant doing business in the State of Missouri? The record discloses, and the court has found, that it had other insurance policies outstanding in the State of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, and at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy.
>
> "Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the State for the purpose of a valid service; it is sufficient if it is doing business therein. We are of opinion that the finding

> of the court in this case is supported by testimony, and that the corporation was doing business in Missouri'' (pp. 255-256).

It is clear, therefore, that the ruling was not predicated on the single circumstance that the agent had come within the state to adjust a claim.

In their brief below, respondents stated that in *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, this Court held ''that where a process service statute permitted it, a single transaction was sufficient business in the state to make the foreign corporation amenable to service of process in that state.'' The quotations from the opinion in that case, *supra,* page 24, refute the statement. That was an action against a foreign railroad corporation in the United States District Court for the Southern District of New York involving a controversy which an authorized agent resident in New York had attempted to adjust with the plaintiff. Service of process was made on a resident director in New York. The ruling that the corporation was doing business in New York did not rest alone upon the attempt to adjust the controversy, but upon facts which were thus summarized:

> ''The testimony discloses that the two roads together constitute a continuous line from St. Louis, through the States of Illinois, Missouri, Tennessee, Arkansas and Louisiana into Texas, and are together known as the 'Cotton Belt Route.' This combination has an office in the city of New York, upon the door of which, as upon the stationery and literature of the companies, the symbol, 'Cotton Belt Route,' is found in use. Underneath appears the general description, 'St. Louis Southwestern Lines,' and there is also named a general eastern freight

agent and traveling freight agent of the lines. With this joint freight agent at the office in New York the matter of the plaintiff's claim was taken up and considered, and correspondence concerning it was had through his office, and a settlement of the claim attempted. It was only after such negotiations for a settlement had failed that this action was brought. Here, then, was an authorized agent attending to this and presumably other matters of a kindred character, undertaking to act for and represent the company, negotiating for it and in its behalf declining to adjust the claim made against it. In this situation we think this was the transaction of business in behalf of the company by its authorized agent in such manner as to bring it within the District of New York, in which it was sued, and to make it subject to the service of process there."

*Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602 and *Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407, in their facts and conclusions are similar to *Commercial Mutual Accident Co.* v. *Davis, supra.* In each, it was held that an insurance company was doing business within the state, not because of an isolated attempt by an agent to adjust a claim there, but because of other facts which the Court considered sufficient to warrant the conclusion that the foreign corporation was within the state in manner and extent sufficient to bring it within the established rule.

It is to be noted, moreover, that the adjustment of losses is an essential part of the normal business of insurance companies, and that agents who are in a state attempting to adjust such claims are engaged there in the ordinary and usual business of their corporations. The business of

Appellant, Consolidated Textile Corporation, which is readily inferable from its name, is quite otherwise; and negotiations for the adjustment and settlement of a particular claim against it are wholly incidental to its business of dealing in textiles.

The following cases hold that the attempted compromise of claims by foreign corporations does not constitute the transaction of business of such character and extent as to subject them to the jurisdiction of the courts of the state where the attempt is made. In many of them, the subject matter of the attempted suit was that involved in the settlement negotiations.

*Good Hope Co.* v. *Railway Barb Fencing Co.*, 22 Fed. 635;

*St. Louis Wire-Mill Co.* v. *Consolidated Barb Wire Co.*, 32 Fed. 802;

*Louden Machinery Co.* v. *American Malleable Iron Co.*, 127 Fed. 1008;

*Wilkins* v. *Queens City Savings Bank & Trust Co.*, 154 Fed. 173;

*Buffalo Sandstone Brick Co.* v. *American Sandstone Brick Machinery Co.*, 141 Fed. 211;

*Ladd Metals Co.* v. *American Mining Co.*, 152 Fed. 1008;

*Craig* v. *Welsh Motor Car Co.*, 165 Fed. 554;

*Hoyt* v. *Ogden Portland Cement Co.*, 185 Fed. 889;

*Noel Construction Co.* v. *George W. Smith & Co.*, 193 Fed. 492;

*Henry M. Day & Co., Inc.*, v. *Schiff Lang & Co.*, 278 Fed. 533;

*Painter* v. *Colorado Springs & Cripple Creek Dist. Ry. Co.*, 127 Mo. App. 248, 104 S. W. 1139.

In the *Louden Machinery Co.* case, *supra*, Judge Smith McPherson of the Southern District of Iowa said:

> "Carrying on of business by a corporation in another state means something more than a single transaction, and certainly something more than the one transaction of an attempt to compromise a matter connected with a contract of the state where the foreign corporation resides and has its being.
>
> * * * * * *
>
> "As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state, surrenders itself to Iowa courts because an agent, with or without authority, comes to this state, seeking to adjust such difference. If such be the law, then compromises, so much favored by law, are largely at an end as to foreign corporations." (127 Fed., p. 1009.)

The following cases are relied upon by Appellee in its brief on motion to dismiss or affirm as being *contra*. In some of them it clearly appears that the court was of opinion that the foreign corporation had transacted business within the jurisdiction in addition to the attempted adjustment of a claim. Those that may be *contra*, however, are, it is submitted, unsound and fail to follow the established doctrine on the subject.

*Meade Fibre Co.* v. *Varn*, 3 Fed. (2d) 520;

*Premo Specialty Mfg. Co.* v. *Jersey Creme Co.*, 200 Fed. 352;

*Dungan Hood & Co.* v. *Bally*, 271 Fed. 517;

*Brush Creek C. & M. Co.* v. *Morgan-Gardner El. Co.*, 136 Fed. 505;

*New Haven P. & B. Co.* v. *Downington M. Co.*, 130 Fed. 605;

*Houston* v. *Filer & S. Co.*, 85 Fed. 757;

*A. Harvey's Sons Mfg. Co.* v. *Sterling M. Co.*, 247 Mich. 317, 225 N. W. 538;

*St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co.*, 222 Ala. 152, 138 So. 834;

*Abbeville Electric L. & P. Co.* v. *Western El. S. Co.*, 61 S. C. 361, 39 S. E. 559.

It is to be observed, moreover, that the claim in suit in the Wisconsin court did not arise out of any business transacted by Appellant within the State of Wisconsin. The record establishes that no business was ever transacted by Appellant in the State of Wisconsin except by Mr. Rupprecht on the occasion of his call upon Mr. Gold. Appellant is a Delaware corporation having its principal office in the State of New York and the record affirmatively establishes that the bonds which were sued on in Wisconsin were payable, principal and interest, in the State of New York (R. 10). Appellant alleged in its petition for writ of prohibition that no part of the transaction in which the bonds were issued took place in Wisconsin (R. 7). This allegation was not denied and there is no evidence in the record to the contrary.

Appellant not having voluntarily subjected itself to the jurisdiction of the court in Wisconsin, such jurisdiction could in any event be exercised only in respect of actions arising out of business transacted within the state.

*Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 325;

*Mitchell Furn. Co.* v. *Selden Breck Co.*, 257 U. S. 213;

*Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93;

*Simon* v. *Southern Ry. Co.*, 236 U. S. 115;

*Old Wayne Mutl. Life Assn.* v. *McDonough*, 204 U. S. 8;

*Smolick* v. *Phila. & Reading Coal Co.*, 222 Fed. 148;

*Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432.

The Appellee, in its brief on motion to dismiss or affirm (p. 8), cites *Eastman Kodak Co.* v. *Southern P. M. Co.*, 273 U. S. 359, as lending some support to its contention that a single transaction by a foreign corporation may, under a liberal process statute, constitute a sufficient transaction of business to subject it to the jurisdiction of the court. Appellee, however, can derive no aid from that case. That was a suit brought in the United States District Court in Georgia against the Eastman Kodak Company, a New York corporation, under the Sherman Anti-Trust Act. The venue was based upon the provision of Section 12 of the Clayton Act that suit might be brought against a corporation "not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; * * *." Jurisdiction of the Court having been challenged, the question for decision was whether the corporation was transacting business in Georgia. It was found that the corporation had

> "for many years prior to the institution of the suit, in a continuous course of business, carried on inter-

> state trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold and shipped photographic materials from New York. A large part of this business was obtained through its travelling salesmen who visited Georgia several times in each year and solicited orders from these dealers which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed travelling 'demonstrators,' who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the defendant" (pp. 370-371).

It is true that this Court held that under these facts the suit could not have been maintained in Georgia under the earlier statute which required that suit be brought "in the district in which the defendant resides or is found." In that connection the Court pointed out that, as applied to a corporation sued in a district where it did not reside, it was necessary under the former statute that the corporation " 'be present in the district by its officers and agents carrying on the business of the corporation' this being the only way in which it could be said to be 'found' within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, *and* was by its duly authorized officers or agents present therein; * * *" (273 U. S.,

p. 371). In other words, the term "found" included two concepts (a) that the corporation was doing business within the district of such nature and character as to warrant the inference that it had subjected itself to the jurisdiction, and (b) that it was there represented by agents engaged in that business. The later statute expressly provided that the transacting of business alone within the district was sufficient to establish the venue of a suit and the presence in the jurisdiction of agents engaged in that business was, therefore, not essential. Service of process under Section 12 of the Clayton Act might be made, and in the *Eastman* case was made, on the corporation in the district of which it was an inhabitant—that is, in the State of New York. It was still necessary, however, in order to sustain jurisdiction, to find that the corporation was carrying on business of a substantial character within the district in which the suit was brought. In defining the nature and extent of business necessary to constitute the transaction of business under the statute, this Court said:

> "* * * that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is 'found' therein and is amenable to local process, —*if in fact, in the ordinary and usual sense, it 'transacts business' therein of any substantial character*" (p. 373).

And again referring to the character and extent of the business which, it was held, constituted the transaction of business by the Eastman Company within the district, this Court said:

> "And, since it appears from the facts already stated that the defendant, *in a continuous course of business,* was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its product through its demonstrators for the purpose of increasing its sales, we conclude that it was transacting business in that district, within the meaning of §12 of the Clayton Act, in such sense as properly established the venue of the suit; * * *" (p. 374).

In other words, the essential element of jurisdiction that the corporation be engaged in the transaction of business in the district remained substantially unchanged; and tested by the general rule theretofore applied, it was found that the corporation was actually engaged in the transaction of a continuous course of business of substantial character and extent.

The significance of the decision as applied to the case at bar lies in the fact that although it was obviously the intention of Congress to enlarge the jurisdiction of the District Court to permit a suit under the Anti-Trust Act in a district where a corporation was merely "transacting business," that term was carefully defined by this Court as contemplating the transaction of business of the character and extent which under previous decisions of this Court was required in order to show that the corporation had become subject to the jurisdiction of the court. Process issued by the District Court of Georgia was held to have been validly served on the Eastman Company *in New York,* Congress having authority under the Constitution to so provide (273 U. S., p. 374). The jurisdiction of state courts on the other hand is confined to their territorial limits; and

both elements of jurisdiction must concur. That is, in the case of a foreign corporation it must be (a) actually engaged in the transaction of business within the State of such nature and extent as to subject it to the jurisdiction (b) through agents within the State upon whom process can be served.

The Eastman case thus serves to indicate the error in the decision in the case at bar. The Supreme Court of Wisconsin overlooked the two-fold test of jurisdiction and held that because the president of the corporation was in the state transacting a single item of business for the corporation, the corporation had thereby become subject to the jurisdiction of the state court, whereas, only one of the two requirements had been met. There was an officer of the corporation within the state engaged in corporate business on whom service of process might be made if, but only if, the corporation was engaged in business within the state of such character and extent as to subject it to the jurisdiction of the court.

A somewhat parallel situation would have been presented in the Eastman case if the Eastman Company had never transacted business in Georgia, but plaintiff had purchased a moving picture camera in New York with a guarantee by the Eastman Company and after a controversy had arisen and suit brought in New York on the guarantee, the president of the Eastman Company had gone to Georgia to compromise and settle the claim. Certainly it would not be suggested that the Eastman Company under such circumstances was transacting business in Georgia of such character and extent as to subject itself to suit there under the Anti-Trust Act. And if Appellant corporation had duly authorized an attorney in Milwaukee to adjust and com-

promise the claims which it was erroneously assumed by the court below Mr. Rupprecht was there to compromise and settle, would it be contended for a moment that Appellant was engaged in the transaction of business in Wisconsin so that service of process in an action involving the subject matter of the claim could, consistently with due process, be served on the Secretary of State?

When the transaction is considered apart from the president who was engaged in it, the want of merit in the contention that such business subjected Appellant to the jurisdiction of the Wisconsin Court is at once apparent. Manifestly in testing the extent and character of the business transacted by the corporation, it is immaterial whether the business is transacted by the president of the corporation or by some other authorized agent.

The court below, however, considered that while an inquiry as to the nature and extent of business transacted by Appellant within the state would have been necessary if service of process had been made upon the Secretary of State, such inquiry was not necessary in this case because service had been made upon Appellant's president while he was in the state engaged in a single transaction of business for Appellant. The court said (R. 40):

> "Under one mode of service, for the purpose of discovering the presence of the corporation, the inquiry involves the extent of business done, under the other we are concerned only with the question as to whether the corporation has so acted as to manifest its presence in the person of its officers to the extent that we may say, it was here at the time and subject to service of process. As was said, although with relation to a different state of facts, in opinion by Mr. Justice Cordoza in Tauza *v.* Susquehanna

> Coal Co., 220 N. Y. 259, 267: 'Activities insufficient to make out the transaction of business, with the meaning of those statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process.' "

Neither the *Tauza* case nor anything that was said therein by Mr. Justice Cardozo supports the court below. There, the Appellate Division had certified to the Court of Appeals the question whether the defendant, a foreign corporation, at the time of service of summons was doing business in the State of New York within the meaning of the New York statute governing the service of summons on foreign corporations. Service had been made on an agent regularly transacting business in New York in defendant's name and behalf. The defendant contended that as it was engaged in interstate commerce only, it was not amenable to suit in New York, and relied upon decisions that foreign corporations engaged in interstate commerce were not doing business in the state within the meaning of a state statue prohibiting the transaction of business by unlicensed foreign corporations. A full quotation from the opinion serves to show that the language could have no possible application to the point in connection with which it was cited and the complete disagreement between the New York court and the Wisconsin court as to the nature and extent of the business required to be transacted by a foreign corporation within the state in order to subject itself to the jurisdiction of the local courts:

> "The defendant refers to cases in which corporations, whose situation was not unlike the defendant's have been held not to be doing business in this state within the meaning of section 15 of the Gen-

eral Corporation Law and kindred statutes.* But activities insufficient to make out the transaction of business, within the meaning of those statutes, may yet be sufficient to bring the corporation within the state so as to render it amenable to process.* In construing statutes which license foreign corporations to do business within our borders we are to avoid unlawful interference by the state with interstate commerce. The question in such cases is not merely whether the corporation is here, but whether its activities are so related to interstate commerce that it may, by a denial of a license, be prevented from being here.* 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'* But the problem which now faces us is a different one. *It is not a problem of statutory construction. It is one of jurisdiction,* of private international law (Dicey Conflict of Laws, pp. 38, 155). We are to say, not whether the business is such that the corporation may be prevented from being here, but whether its business is such that it *is* here. *If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity,* then, whether its business is interstate or local, it is within the jurisdiction of our courts (*International Harvester Co.* v. *Kentucky, supra,* at p. 587)" (pp. 266-7).

Appellee contends, in its brief on motion to dismiss or affirm, that Appellant had transacted business in Wisconsin through a subsidiary, Consolidated Selling Co., Inc. As heretofore seen (*supra,* pp. 13, 14), there is no basis in fact for the contention. Much less is there evidence to warrant any inference that Appellant was using its subsidiary

* Cases cited are omitted.

as a mere instrumentality for the conduct of its own business.

Numerous recent decisions of this Court establish beyond controversy that the transaction of business in Wisconsin by Appellant's subsidiary does not subject Appellant to the jurisdiction of the courts of that state.

*Cannon Mfg. Co.* v. *Cudahy*, 267 U. S. 333;
*Louisville & N. R. Co.* v. *Chatters*, 279 U. S. 320, 326;
*People's Tobacco Co.* v. *Am. Tobacco Co.*, 246 U. S. 79, 87;
*Phila. & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264, 268;
*Peterson* v. *Chicago, Rock Island & Pac. Ry.*, 205 U. S. 364, 391-392;
*Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 409;
*Pullman Car Co.* v. *Missouri Pac. Co.*, 115 U. S. 587, 597.

In *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333, the plaintiff in an action brought in North Carolina sought to sustain the jurisdiction of the court over a Maine corporation by showing that a subsidiary corporation transacted business within the jurisdiction and that there was an identity *pro hac vice* between the Maine corporation defendant and its subsidiary. Judgment of the lower court dismissing the action for want of jurisdiction was sustained by this Court. The following quotation from the opinion completely disposes of the contention of the Appellee in the case at bar:

"The defendant wanted to have business transactions with persons resident in North Carolina, but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity. It might have conducted such business through an independent agency without subjecting itself to the jurisdiction. *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. It preferred to employ a subsidiary corporation. Congress has not provided that a corporation of one State shall be amenable to suit in the federal court for another State in which the plaintiff resides, whenever it employs a subsidiary corporation as the instrumentality for doing business therein. Compare *Lumiere* v. *Mae Edna Wilder, Inc.*, 261 U. S. 174, 177-8. That such use of a subsidiary does not necessarily subject the parent corporation to the jurisdiction was settled by *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, 409-11; *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364; and *People's Tobacco Co., Ltd.* v. *American Tobacco Co.*, 246 U. S. 79, 87. In the case at bar, the identity of interest may have been more complete and the exercise of control over the subsidiary more intimate than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction" (pp. 336-337).

## Conclusion.

It is submitted that Appellant Corporation had not by the transaction of business within the State of Wisconsin subjected itself to the jurisdiction of the courts of that state; that the attempted exercise of jurisdiction over Appellant by the state court under the circumstances

shown on this record constituted a denial of due process; that Section 262.09 (13) of the Wisconsin Statutes, which was held by the court below to authorize the exertion of such jurisdiction, is void for repugnancy to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States; and that the judgment of the court below should be reversed.

Respectfully submitted,

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